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No.

IN THE

Supreme Court of the United States

October Term, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Appellant,

v.

THE FINANCE ADMINISTRATION AND THE TAX COMMISSION OF THE CITY OF NEW YORK,

and

ROBERT ABRAMS,
Attorney General of the State of New York,

Appellees.

On Appeal From the Court of Appeals of New York

JURISDICTIONAL STATEMENT

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The underlying issue in this appeal is whether a State constitutionally may enact a statute (1) the effect of which is to insulate from challenge unauthorized inequality in real property assessment practices ("inequality of assessment"), by precluding the only viable—and most probative—proof of such inequality, and (2) the result of which is to deny taxpayers the right to Equal Protection and Due Process of law. The State of New York, on December 3, 1981, enacted precisely such a statute, Act of December 3, 1981, ch. 1057, § 7, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp. 1 at 1981-233) ("L. 1981, ch. 1057, § 7"). This case challenges the constitutionality of that statute.

QUESTION PRESENTED

Whether the New York State statute, L. 1981, ch. 1057, § 7, which effectively denies to a taxpayer in New York City the right to prove inequality of assessment with respect to real property taxes levied prior to the enactment of the statute, denies that taxpayer the Equal Protection or Due Process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

LIST OF PARTIES

The parties in the Court of Appeals of New York are set forth in the caption of the case in this Court.[1]

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1. The Court of Appeals of New York held joint oral argument and issued a joint opinion in this case and the case of *Colt Industries, Inc. v. Finance Administrator of the City of New York*, 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982). The joint opinion, however, contained separate orders. Moreover, these two cases were not consolidated below and were separately briefed in the Court of Appeals.

The Appellant has notified the Clerk of this Court that it does not consider Colt Industries a party to the proceeding in the Court from whose judgment this appeal is being taken, and has served Colt Industries with a copy of this notice. Should this Court conclude that Colt Industries was a party to that proceeding within the meaning of Rules 10 and 15 of the United States Supreme Court Rules, Colt Industries should be deemed a party with no interest in the outcome of this appeal which has received proper notice in accordance with Rule 10.4 of the United States Supreme Court Rules.

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The opinion of the Court of Appeals of New York (App., *infra*, A1-A9) is reported at 54 N. Y. 2d 533, 446 N. Y. S. 2d 237 (1982). The memorandum opinion of the Appellate Division of the Supreme Court of New York, First Judicial Department (App., *infra*, A10-A11) is reported at 81 A. D. 2d 781, 441 N. Y. S. 2d 385 (1st Dept. 1981).[2] The unreported verbal opinion of the Supreme Court of New York, rendered on August 7, 1980 (order entered on August 12, 1980), is reprinted in the Appendix attached hereto (App., *infra*, A12-A19).

The verbal opinion of the Supreme Court of New York incorporated by specific reference its prior unreported written opinion in *Colt Industries, Inc. v. Finance Administrator of the City of New York*, N. Y. L. J., June 4, 1980, at 10, col. 2 (Sup. Ct. N. Y. Co., June 12, 1980). This written opinion is reproduced in the Appendix hereto (App., *infra*, A20-A31).

JURISDICTION

The order of the Court of Appeals of New York was entered on January 7, 1982. The Court of Appeals, on March 23, 1982, denied the motion for reargument made by the Equitable Life Assurance Society of the United States on February 6, 1982. A notice of appeal to this Court was filed in the Court of Appeals on March 29, 1982. On June 16, 1982, Justice Marshall extended the time for docketing the appeal to and including August 20, 1982. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2). *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 479, 481 (1975); *Pope v. Atlantic C. L. R. Co.*, 345 U. S. 379, 381-83 (1953).

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2. The dissenting opinion in the Appellate Division of the Supreme Court of New York incorporates by specific reference the dissenting opinion in *Colt Industries, Inc. v. Finance Administrator of the City of New York* (App., *infra*, A50-A57), which is reported at 81 A. D. 2d 777, 439 N. Y. S. 2d 385 (1st Dept. 1981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional Provisions involved are the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent portion of the challenged State statute, L. 1981, ch. 1057, § 7, reads as follows:

> § 7. Subdivision three of Section seven hundred twenty of such law [New York Real Property Tax Law] is REPEALED and a new subdivision three is added to read as follows:
>
> 3. Evidence on the issue of whether an assessment is unequal shall be limited as hereinafter provided. The parties shall mutually agree on the parcels to be appraised and the number of witnesses to be heard with respect to such issue. In the event the parties fail to agree on such parcels or on the number of witnesses, upon application of either party the court or referee shall select the parcels to be appraised without reference to their assessed values, or shall determine the number of witnesses, or both, as the case may be.
>
> Before any testimony is given by either party as to the value of such parcels, each party shall simultaneously file with the court or referee, on a date fixed by the court or referee, a written statement or tabulation of the appraised values placed upon such parcels by the witnesses of the respective parties, and each party shall serve on the other at the same time a copy of

such statement or tabulation of values stated by his witnesses. The parties shall be limited in their proof on the trial of such issue to such parcels and witnesses, except that in any event, whether or not parcels are selected as hereinabove provided, evidence may be given by either party as to the following:

(a) in all assessing units, actual sales of real property within the assessing units that occurred during the year in which the assessment under review was made;

(b) in all assessing units other than special assessing units as defined in section eighteen hundred one [App., *infra*, A72] of this chapter [assessing units with a population of over 1,000,000, *i.e.*, New York City and Nassau County], the state equalization rate established for the roll containing the assessment under review; or

(c) in all special assessing units as defined in section eighteen hundred one of this chapter, only for proceedings commenced with respect to assessment rolls completed after December thirty-first, nineteen hundred eighty-three, the latest applicable class ratio established for the roll containing the assessment under review; provided, however, that such class ratios shall not be admissible pursuant to this paragraph unless the petitioner alleges and proves an inequality greater than twelve and one half percent of such class ratio.

STATEMENT OF THE CASE

As set out in the introductory paragraph, the underlying issue in this appeal is whether a State constitutionally may enact a statute the effect of which is to insulate from challenge unauthorized inequality in real property assessment practices, by precluding the only viable—and most probative—proof of such inequality, and the result of which is to deny taxpayers the right to Equal Protection and Due Process of law.

On December 3, 1981, the Legislature of the State of New York ("State") enacted a comprehensive real property assessment scheme, Act of December 3, 1981, ch. 1057, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp., at 1981-219, *et seq.*) designed to overrule the decision of the Court of Appeals of New York in *Hellerstein v. Assessor of Town of Islip*, 37 N. Y. 2d 1, 371 N. Y. S. 2d 388 (1975), which required full value assessment for all properties.[3] This legislative enactment provides that all real property be assessed at a uniform percentage of value (fractional assessment). *Id.*, § 305(2) (App., *infra*, A70). At all times pertinent hereto, the City of New York, pursuant to Chapter 7, Title E, § E17-8.0 of the Administrative Code of the City of New York, was required to assess real property at uniform full value, *see People ex rel. Parklin Operating Corp. v. Miller*, 287 N. Y. 126, 128-29 (1941); the City did not have an authorized classification system of assessment.[4]

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3. L. 1981, ch. 1057 was enacted over the veto of Governor Hugh Carey. The Governor's Veto Memorandum found that the provisions of the bill "do not meet the standards of fairness to which our taxpayers are entitled." *New York State Legislative Annual—1981*, at page 622.

4. The City has contended that pursuant § 307(3) of the Real Property Tax Law of New York, enacted in 1978 (expired on October 30, 1981), it was excused from complying with the full value assessment mandate of its Administrative Code. In any

The actual ratio of assessed value-to-full market value, utilized by New York City in its real property assessment system for the period pertinent hereto, is available from a single source: the State Board of Equalization and Assessment ("SBEA"), a permanent State agency created in 1960. Pursuant to § 1200 of the Real Property Tax Law of New York ("RPTL"), the SBEA is required to compile the aggregate ratio of assessed value-to-fair market value ("State Equalization Rate") for property within each assessing unit within the State. Utilization of the State Equalization Rate, therefore, readily exposes inequality of assessment of a particular property *vis-à-vis* all other properties within the assessing unit.

In a series of enactments, commencing in 1979, the State Legislature precluded use of the State Equalization Rate in real estate tax proceedings. Act of May 22, 1979, ch. 126, § 2, McKinney's 1979 N. Y. Session Laws 351; Act of January 29, 1981, ch. 3, § 1, McKinney's 1981 N. Y. Session Laws 4; Act of May 15, 1981, ch. 107, § 1, McKinney's 1981 N. Y. Session Laws 220; Act of June 16, 1981, ch. 259, § 1, McKinney's 1981 N. Y. Session Laws 441; L. 1981, ch. 1057, § 7 (preclusion in New York City and Nassau County only).

Prior to the legislative enactments precluding use of the State Equalization Rate in real estate tax proceedings, the Court of Appeals of New York expressly held the State Equalization Rate to be the most objective evidence of inequality: "Utilization of the equalization rate which is objectively arrived at, and which today is expertly arrived at, would tend to greatly simplify and narrow the [real estate tax] proceeding." *Ed Guth Realty, Inc. v. Gingold*, 34 N. Y. 2d 440, 449-50, 358 N. Y. S. 2d 372-73 (1974). The *Guth* Court concluded:

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4. (Cont'd.)
event, RPTL § 307 did not authorize a classification scheme of assessment; nor did any Courts of the State during their review of this case accept the position asserted by the City.

"[W]hile the primary purpose of the State equalization rate may be to facilitate uniform State aid to localities, there is no discernible reason why it also may not be used in individual inequality cases." 34 N. Y. 2d at 451, 358 N. Y. S. 2d at 373.

Against this background, the Appellant, the Equitable Life Assurance Society of the United States ("Equitable"), commenced proceedings to review the tax assessments of its real property located at 717 Fifth Avenue, City and State of New York, for the tax years 1977-78 through 1979-80, inclusive. Similarly, proceedings challenging the tax assessments for the tax years 1972-73 through 1979-80, inclusive, of the real property located at 645 Madison Avenue, City and State of New York, were commenced by timely service and filing of petitions for the respective tax years. The petitions relative to each of these two properties alleged, *inter alia*, that the assessments were erroneous by reason of inequality in that they were made at a higher proportionate valuation than were the assessments of other property in New York City generally.

Pursuant to the rules of the Supreme Court of New York, Equitable timely advised the Court of its intent to proceed to trial of each matter on the claim of inequality. On July 28, 1980, Equitable, seeking to use the State Equalization Rate to establish the inequality of its real property assessments, moved to dismiss certain defenses to its inequality claims and for partial summary judgment.

Upon denial of its motions by the trial court, Equitable proceeded through the appellate process of the State, arguing that it had a Constitutional right to use the State Equalization Rate to establish the inequality of its assessments.[5]

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5. The statute initially challenged by Equitable in the Supreme Court of New York was RPTL § 720(3) (Act of May 22, 1979, ch.

HOW THE FEDERAL QUESTION WAS PRESENTED

The federal question raised by Equitable at each judicial level of this case was whether the State, in precluding Equitable from using the State Equalization Rate to establish the inequality of its real property assessments, denied to Equitable its right to the Equal Protection and Due Process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

The federal question was raised initially in the papers submitted in support of July 28, 1982 motions made before the Supreme Court of New York. Equitable asserted therein that the Act of May 22, 1979, ch. 126, § 2, 1979 McKinney's N. Y. Session Laws 351 ("RPTL § 720(3)") (a predecessor of L. 1981, ch. 1057, § 7) need not be read in a fashion so as to preclude use of the State Equalization Rate and that if so read the statute violated the right of Equitable to the Equal Protection and Due Process of law guaranteed by the Fourteenth Amendment

5. (Cont'd.)

126, § 2, McKinney's 1979 N. Y. Session Laws 351. This statute amended the Act of April 27, 1969, ch. 302, § 2, McKinney's 1969 N. Y. Session Laws 399, which had permitted a taxpayer to rely solely upon the State Equalization Rate for proceedings commenced after April 27, 1969. The 1979 amendment eliminated all reference to use of the State Equalization Rate and was declared applicable to any proceeding commenced after January 1, 1970 and not finally determined as of May 22, 1979. By its terms, the 1979 amendment was to expire on December 31, 1980. The terms of the amendment, however, were extended repeatedly by the Legislature. Act of January 29, 1981, ch. 3, § 1, McKinney's 1981 N. Y. Session Laws 4; Act of May 15, 1981, ch. 107, § 1, McKinney's N. Y. Session Laws 220; Act of June 16, 1981, ch. 259, § 1, McKinney's 1981 N. Y. Session Laws 441. On October 30, 1981, L. 1981, ch. 259, § 1, expired. On December 3, 1982, RPTL § 720(3) was repealed and the statute challenged herein, L. 1981, ch. 1057, § 7, was enacted.

of the Constitution of the United States. The trial court rejected these positions, denied Equitable the relief sought and, on August 12, 1980, entered an order to that effect.

Equitable appealed the order of the Supreme Court of New York to the Appellate Division, First Judicial Department, of that Court on September 10, 1980. Equitable continued its challenge of the constitutionality of RPTL § 720(3), as amended, and again asserted its right to Equal Protection and Due Process of law. On December 11, 1980, the Appellate Division granted the motion of Robert Abrams, Attorney General for the State of New York, to intervene in the appeal.[6] The Appellate Division, on May 14, 1981, affirmed the order of the trial court on the verbal opinion of that court. Presiding Judge Murphy dissented, determining RPTL § 720(3) to be unconstitutional insofar as it operated retroactively against pending petitions for tax periods prior to May 22, 1979. On June 9, 1981, the Court granted, as a matter of law, the motion of Equitable for leave to appeal its decision to the Court of Appeals of New York.

The Equal Protection and Due Process arguments, made to the two lower courts, were presented to the Court of Appeals of New York. Subsequent to briefing and oral argument before the Court of Appeals, the Legislature repealed the challenged statute, RPTL § 720(3), and enacted L. 1981, ch. 1057, § 7. Upon the December 3, 1981 enactment of the statute herein challenged, the Court of Appeals requested supplemental briefs by the parties to the appeal regarding the newly-enacted statute. Equitable made two arguments. First, it urged that L. 1981, ch. 1057, § 7, which precludes use of the State Equalization Rate in New York City and Nassau County, was not applicable retroactively to the proceedings at

6. Mr. Abrams sought permission to intervene since the appeal challenged the constitutionality of a State statute.

issue in the appeal. Alternatively, Equitable demonstrated that even if the law were deemed retroactively applicable to assessment challenges commenced prior to its enactment, it was of no effect because it violated the right of Equitable to Equal Protection and Due Process of law in that it precluded use of the only viable—and most probative—method of establishing inequality of assessment.

The Court of Appeals, on January 7, 1982, modified the order of the Appellate Division of the Supreme Court, First Department, in ways not directly relevant to this appeal, and, as so modified, affirmed it. In so doing, the Court of Appeals held that L. 1981, ch. 1057, § 7 was retroactively applicable to the assessment challenges of Equitable and specifically further held that the statute did not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States. From this portion of the decision of the Court of Appeals, Equitable took this appeal.

THE QUESTION IS SUBSTANTIAL

The question of the scope of protection of the Due Process and Equal Protection Clauses of the Fourteenth Amendment against arbitrary and confiscatory real property taxation is substantial. The issue regarding this protection, presented in this case, is a novel one which falls in the interstices of prior decisions by this Court on the subject. In order to aid the Court in understanding the issue involved in this case and its novelty, a summary of the important provisions and recent developments in the State property tax law follows.

In New York City and the rest of the State, challenges to tax assessments may be predicated on one or more of three grounds: (1) overvaluation, (2) illegality, and (3) inequality. *See* Act of December 3, 1981, ch. 1057, §§ 706, 707, McKinney's 1981 N. Y. Session Laws (Mar. 1982 Supp., at 1981-232-33) (App., *infra*, A71-A72); Administrative Code of the City of New York, Vol. 2 ch. 7, Title A, § 166-1.0(b) (App., *infra*, A70). As a practical matter, the grounds of overvaluation and illegality are illusory means of redressing confiscatory and arbitrary tax assessments.

Overvaluation is a non-viable basis for relief from excessive taxation because the prevalent practice of assessing jurisdictions within the State has been to assess real property at differing fractions of the legally mandated full value rate of assessment, which was required at all times pertinent hereto. *See Hellerstein v. Assessor of the Town of Islip, supra* 37 N. Y. 2d at 13, 371 N. Y. S. 2d at 398. This practice has resulted in two different assessment standards being applied by the taxing authorities and the courts: a full value standard of assessment has been applied by the courts in ruling on tax assessment challenges, while some fraction of that standard has been used by the taxing authorities. *Id.; People ex rel. Parklin*

Operating Corp. v. Miller, supra, 287 N. Y. at 128-29. Thus, overvaluation is an illusory remedy for assessment review inasmuch as the challenging taxpayer, by proceeding with such a challenge, will have conceded the assessment ratio to be 100% of full value, which it is not.

Hellerstein v. Assessor of the Town of Islip, supra, also demonstrates the illusory nature of an illegality challenge, a seldom used basis for tax assessment relief. In *Hellerstein,* the taxpayer argued that the entire roll for the town of Islip was void by reason of illegality in that her property and all other property in the town had been assessed at less than its full value. 37 N. Y. 2d at 3, 371 N. Y. S. 2d at 389. Although the New York Court of Appeals agreed that the assessments in Islip were illegal because they were made at less than full value, it concluded that it would be inappropriate for it to disturb the assessment roll of the town and, therefore, denied the taxpayer any relief as to past erroneous assessments. 37 N. Y. 2d at 14, 371 N. Y. S. 2d at 399.

The final ground for challenging the validity of real property tax assessments is inequality. Pursuant to the provisions of newly-enacted L. 1981, ch. 1057, § 7, inequality of an individual assessment may be established throughout the State by either, or both, of two methods: (1) the ratio of assessed value-to-full market value, as determined by appraisals of selected properties within the assessing unit ("selected parcels method"), or (2) the ratio of assessed value-to-full market value, as determined by sales with the assessing unit ("sales method"). Taxpayers in all assessing units within the State, except New York City and Nassau County, additionally are permitted by L. 1981, ch. 1057, § 7 to establish inequality of assessment by utilizing the State Equalization Rate.

As a practical matter, neither the selected parcels method nor the sales method—the only two methods

statutorily permitted in Nassau County and New York City—is a viable means of proving inequality of assessment within these two assessing units because of prohibitive costs and the excessive expenditure of time thereby required. In *860 Executive Towers, Inc. v. Board of Assessors of County of Nassau*, 53 A. D. 2d 463, 385 N. Y. S. 2d 604 (2d Dept. 1976), *aff'd sub nom. Pierre Pellaton Apartments, Inc. v. Board of Assessors of County of Nassau, on opinion below*, 43 N. Y. 2d 769, 401 N. Y. S. 2d 1013 (1977), the Court of Appeals of New York determined that a taxpayer cannot be relegated "to the time-consuming and expensive selected-parcel method of proving ratio, which has heretofore served to limit the number of certiorari proceedings and the amount of relief secured." 53 A. D. 2d at 471, 385 N. Y. S. 2d at 610.

The plurality of the Appellate Division of the Supreme Court in *Slewett & Farber v. Board of Assessors of the County of Nassau*, 78 A. D. 2d 403, 435 N. Y. S. 2d 313 (2d Dept. 1981), *aff'd in part, modified in part, upon reargument*, 80 A. D. 2d 186, 438 N. Y. S. 2d 544, *modified*, 54 N. Y. 2d 547, 446 N. Y. S. 2d 241 (1982), reviewed the costs incurred in using the selected parcels method in the *860 Executive Towers v. Board of Assessors of County of Nassau* case, *supra*, and found that the record therein indicated that: (1) legal research and preparation totalled 2,000 hours; (2) the trial extended over 50 full or partial days, as reflected by the trial transcript of approximately 7,000 pages; and (3) the total cost attributable to the selected parcels approach amounted to $484,000. 80 A. D. 2d at 215, 438 N. Y. S. 2d at 565. Upon review of the foregoing facts, the plurality concluded: "But if parcel selection seems an unconstitutionally expensive method by which to prove inequality, it is not the exclusive method, for the challenged statute [RPTL § 720(3), as then amended, now repealed] also permits proof of actual sales." *Id.*

The sales method is not viable by reason of essentially the same defects. Two months after the decision of the Appellate Division in *Slewett & Farber v. Board of Assessors of the County of Nassau,* the trial court in *Canigiani v. Board of Assessors of Nassau County,* N. Y. L. J., July 9, 1981, at 13, col. 2 (Sup. Ct. Nassau Co., June 29, 1981) (App., *infra* A58-A69), examined at length the viability of the sales method of establishing inequality. The Court found that the cost of establishing inequality, utilizing the sales approach, ranged from a low of $301,000 to a high of $644,000 for each of the seven tax years at issue therein. *Id.* The total expense of such an approach for the seven years at issue in the proceeding amounted to $2,000,000 to $4,500,000. *Id.* In contrast, the potential recovery per year for the one-story property owned by Mr. Canigiani was no more than $10,000, or a total potential recovery for the seven years at issue of less than $70,000. *Id.* In light of these facts, the Court concluded that the cost of establishing the aggregate ratio of assessed values to total full values by use of the sales method is "highly exorbitant and prohibitive" and thus, like the sample parcels method, the sales method of establishing inequality has no viability. *Id. See also Ed Guth Realty, Inc. v. Gingold, supra,* 34 N. Y. 2d at 449, 358 N. Y. S. 2d at 372.

The costs of establishing inequality of assessment in New York City by either the sales method or selected parcels method are significantly greater than those costs incurred in *860 Executive Towers, Inc. v. Board of Assessors of County of Nassau, supra,* and those costs anticipated in *Canigiani v. Board of Assessors of Nassau County, supra.* As set forth in the affidavit of Jerome Haims, M. A. I., annexed hereto (App., *infra,* A47-A49), the cost of the sales method in this case would be approximately $2,500,000; the cost of appraisals of comparable, selected parcels would be approximately $500,000 to $640,000.

Additionally, it would take approximately one year to compile the sales data and approximately twenty-two months to appraise comparable parcels. *Id.* Moreover, the estimates of Mr. Haims are particularly low, inasmuch as they were prepared on a section basis of comparison, as improperly required by the trial court, and not on the City wide basis, as permitted by the Court of Appeals of New York in this matter.

Thus, except in the most extreme cases, aggrieved taxpayers who must rely on one of these two methods of establishing inequality are precluded from obtaining judicial relief because the cost of proving inequality of assessment exceeds the tax refund to which the taxpayer would be entitled.[7] The challenged statute thus effectively precludes New York City and Nassau County taxpayers from challenging confiscatory taxation by limiting these taxpayers to two illusory methods of proving inequality of assessment.

The chilling effect of limiting New York City taxpayers to the selected parcels and sales methods of establishing inequality of assessment is evidenced by the fact that there have been no real estate tax inequality proceedings within New York City for approximately eighty years. *See Colt Industries v. Finance Administrator of the City*

7. Both the selected parcels and sales methods of proof have other drawbacks. When the selected parcels method is used, each side submits evidence of parcels with extreme ratios of assessed value-to-full value in support of its position. Thus, the court is presented with widely disparate and contradictory evidence of the actual ratio of assessed value-to-market value within a taxing district. *See Ed Guth Realty, Inc. v. Gingold, supra,* 34 N. Y. 2d at 449-50, 358 N. Y. S. 2d at 372-73. The additional drawbacks of the actual sales method arise from the difficulty of ascertaining the full consideration given to purchase property. Not every reported sale is at arms' length and the consideration reflected in deeds and tax stamps is often less than the full consideration given.

of New York, supra (App., *infra*, at A20-A21).

The State Equalization Rate is the only viable means of establishing inequality of assessment. Yet its use is precluded in New York City and Nassau County tax proceedings by L. 1981, ch. 1057, § 7. This Rate, officially propounded by a State agency, is readily available at minimal expense to aggrieved taxpayers asserting inequality of assessment claims.[8] Moreover, the State Equalization Rate has previously been determined by the highest Court of the State to be "objectively arrived at" and "expertly arrived at" and, as such, to be relevant and competent evidence in real estate tax proceedings. *Ed Guth Realty Inc. v. Gingold, supra*, 314 N. Y. 2d at 449-50, 358 N. Y. S. 2d at 372-73. *See also, J. A. Green Construction Corp. v. Finance Administrator and Tax Commission of the City of New York*, 56 N. Y. 2d 369 (1982).

A. Due Process Issue Presented by This Appeal

"No state shall . . . deprive any person of . . . property without due process of the law. . . ." § 1, XIV Amend., U. S. Const. From the language quoted from the Fourteenth Amendment, it is evident that a State may not deprive a taxpayer of property by imposing excessive taxes on his property without affording him a legal remedy to correct such arbitrary and confiscatory taxation.

Similarly, "[A]lthough a vested cause of action is property and is protected from arbitrary interference (*Pritchard v. Norton*, 106 U. S. 124, 132), the appellant has no property, in the constitutional sense, in any particular form of remedy; *all that he is guaranteed by the*

8. In addition to its use in tax proceedings outside the City and Nassau County, the State Equalization Rate is used to determine the amount of State aid to which political subdivisions within the State are entitled.

Fourteenth Amendment is the preservation of his substantial right to redress by some effective procedure." Gibbes v. Zimmerman, 290 U. S. 326, 332 (1933) (emphasis added).

The Due Process issue presented in this appeal is: What is the "effective procedure" guaranteed by the Fourteenth Amendment? While, as stated by this Court in *Gibbes*, the Fourteenth Amendment does not guarantee any particular form of remedy, it cannot be said that the State statute challenged herein which cosmetically provides illusory remedies, thereby provides Equitable the "effective procedure" guaranteed by the Fourteenth Amendment to assert its right to redress confiscatory real property taxation.[9]

B. Equal Protection Issue Presented by This Appeal

"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." § 1, XIV Amend., U. S. Const.

The challenged State statute, L. 1981, ch. 1057, § 7, which presently permits the use of the State Equalization Rate in all assessing units of the State except New York City and Nassau County, a distinction based on the size of the population in each of these areas, unconstitutionally distinguishes between assessing units within the State. Nonetheless, the Court of Appeals of New York, relying primarily on the decisions of this Court in *Missouri v. Lewis*, 101 U. S. 22 (1879) and *Salsburg v. Maryland*, 346 U. S. 545 (1954), concluded that the size of population distinction in this statute does not violate the Equal Protection Clause of the Fourteenth Amendment.

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9. See *Study for City Calls Realty Tax Hideously Inequitable*, N. Y. Times, Apr. 24, 1981, § 1, at 1, col. 2.

The Court of Appeals, however, in relying on these cases, failed to consider the restrictions placed on the Constitutional validity of territorial distinctions by this Court in *Lewis* and *Salsburg*. As this Court noted in *Lewis*, a State may make laws which distinguish between territories within the State only "provided it does not deprive any person the equal protection of the laws, including the *equal right to resort to appropriate courts for redress.*" 101 U. S. at 30 (emphasis added). Similarly, in *Salsburg*, this Court stated: "The cumbersomeness of such centrally enacted legislation [regarding evidentiary rules in certain criminal prosecutions] as compared with the variations which may result from home rule is a matter for legislative discretion, not judicial supervision, *except where there is a clear conflict with constitutional limitations.*" 346 U. S. at 552-53 (emphasis added).

The size of population distinction upheld by the Court of Appeals in concluding that the Legislature could distinguish between New York City and Nassau County on the one hand, and the rest of the State on the other, contravenes the restrictions placed on territorial distinctions in *Lewis* and *Salsburg*.

As previously set forth, the size of population distinction (later described by the Court of Appeals of New York, in *J. A. Green Construction Corp. v. Finance Administrator and the Tax Commission of the City of New York, supra*, 56 N. Y. 2d at 376-77, as an economic distinction) sanctioned by the Court of Appeals in this case denies Equitable its right to Due Process of the law. Further, this size of population, or economic, distinction denies Equitable its right to Equal Protection of the laws in that it denies to it and other taxpayers in New York City and Nassau County an effective means of redressing intentionally arbitrary and discriminatory tax assessments. *See Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352-53

(1918). Additionally, the size of population, or economic, distinction drawn by L. 1981, ch. 1057, § 7 denies to Equitable "the equal right to resort to the appropriate courts for redress."

Moreover, the distinctions in the challenged statute have been recognized by the Court of Appeals of New York to be more than the simply procedural distinctions reviewed by this Court in *Salsburg* and *Lewis*. In *J. A. Green Construction Corp. v. Finance Administrator and the Tax Commission of the City of New York, supra*, 56 N. Y. 2d at 376, the Court of Appeals permitted use of the State Equalization Rate, a right it previously denied to Equitable. The Court held:

> "Though the kind of proof admissible to establish value is normally a procedural question to be determined by the law in effect at the time of trial [citations omitted], we think the history of legislation on this issue [footnote omitted] and the differention by the Legislature between New York City and Nassau on the one hand and the rest of the State on the other, based as it is upon the *economic*[10] effect of the differentiation, so imbues this normally procedural issue with substantive effect that we should not apply the usual rule." 56 N. Y. 2d at 376-77 (emphasis in original).[11]

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10. As detailed in the introductory portion of this section, the cost of proof of inequality of assessment in these two areas by the selected parcels and sales methods is so great that it effectively precludes challenges to unequal assessments made in these areas.

11. The Court of Appeals permitted use of the State Equalization Rate in the *Green* case because the predecessor to L. 1981, ch. 1057, § 7 (in effect at the time at trial) had expired and the new statute was not enacted at the time the taxpayer in *Green* used the Rate.

Finally, that the Constitutional right of equality of assessment, in the absence of a valid classification system of assessment, cannot be eradicated directly or retroactively is axiomatic. *Hillsborough Township v. Cromwell*, 326 U. S. 620, 623 (1946); *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441, 446 (1923); *Sunday Lake Iron Co. v. Wakefield, supra*, 247 U. S. at 352-53. It is just as incontrovertible that a State cannot impinge upon this right indirectly by declaring the only viable evidence of violations of this right to be inadmissible, so that taxpayers effectively cannot challenge unconstitutional discriminatory practices of the assessing authority.

The words of Justice Holmes in *Davis v. Wechsler*, 263 U. S. 22, 24 (1923) are particularly apposite here:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal rights. The principle is general and necessary. *Ward v. Love County*, 253 U. S. 17, 22, 40 Sup. Ct. 419, 64 L. Ed. 751. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds [citation omitted]. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way [citation omitted]."

The decision of the Court of Appeals in this case is final; Equitable is precluded from using the State Equalization Rate to establish violation of its right to uniformity of assessment. For all intents and purposes, the federal issue presented herein is conclusive of the outcome of the case. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U. S. at 479; *Pope v. Atlantic C. L. R. Co., supra,* 345 U. S. at 381-83. Further review of this substantial federal issue cannot be had. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U. S. at 481.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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